U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0496 BLA

DENNIS L. STILES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY, LLC c/o CONSOL ENERGY CORPORATION	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 11/03/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05629) rendered on a claim filed on February 27, 2020,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-three years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] Claimant filed two prior claims for benefits. Director's Exhibits 1, 2. He withdrew both of them. *Id*. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; Hearing Tr. at 5.

accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole.[5] Decision and Order at 16-22; 20 C.F.R. §718.204(b)(2)(iv).

Medical Opinions

The ALJ considered the medical opinions of Drs. Zlupko, Basheda, and Rosenberg. Decision and Order at 20-22. Drs. Zlupko and Basheda opined Claimant is totally disabled, while Dr. Rosenberg opined he is not. Director's Exhibits 14, 17; Employer's Exhibits 2; 5; 6 at 27-28, 32-33; 7. The ALJ found Dr. Zlupko's opinion not reasoned. Decision and Order at 22. He further found Dr. Basheda's opinion "better reasoned" than Dr. Rosenberg's contrary opinion. *Id.* at 21-22. Thus, he found the medical opinions support a finding of total disability based on Dr. Basheda's opinion. *Id*. at 22.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Tr. at 5.

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-19.

Employer has not challenged the ALJ's finding that Dr. Basheda's opinion is "better reasoned" than Dr. Rosenberg's contrary opinion. Employer's Brief at 18. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We further reject Employer's argument the ALJ erred in finding Dr. Basheda's opinion supports a finding that Claimant is totally disabled. Employer's Brief at 18.

Dr. Basheda diagnosed Claimant with a "Class I/II impairment" under the *American Medical Association Guides to the Evaluation of Permanent Impairment* based on the values obtained on his December 3, 2021 pulmonary function study. Employer's Exhibit 2 at 23. He opined that while this level of impairment would not prevent Claimant from performing his last coal mine work, he is unable to return to his prior coal mine work based on his arterial blood gas study and pulse oximetry study results which demonstrated the existence of an oxygenation impairment. Employer's Exhibits 2 at 23; 6 at 32-34. Thus, he concluded Claimant is totally disabled. Employer's Exhibit 6 at 40.

The ALJ noted Dr. Basheda stated that Claimant's last coal mine job as a roof bolter required him "to lift and carry 50-pound rock dust bags on a regular basis." Decision and Order at 21; Employer's Exhibit 2 at 8. He thus concluded Dr. Basheda "detailed the exertional requirements of Claimant's last coal mining job." Decision and Order at 22. Further, he found Dr. Basheda opined that Claimant has a "moderate to severe" restriction and could not return to his last coal mine work because his arterial blood gas and pulse oximetry studies indicated "exercise induced hypoxemia." *Id.*; Employer's Exhibit 6 at 24, 26, 32-34. Thus, contrary to Employer's argument, the ALJ rationally concluded Dr. Basheda's opinion supports a finding that Claimant "has a total respiratory or pulmonary total disability due to his inability to perform his usual coal mine work or comparable and gainful employment." Decision and Order at 22; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000).

We also reject Employer's argument that the ALJ erred in failing to consider that Dr. Basheda opined Claimant's disability is "completely" unrelated to his coal mine dust exposure. Employer's Brief at 19. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Even if credited, Employer's argument would concern whether Claimant's disability is caused by dust exposure in coal mine employment, not whether he suffers from a totally disabling respiratory impairment at all.

We further reject Employer's characterization that Dr. Zlupko did not render "an unequivocal medical opinion of total pulmonary disability due to coal mine employment." Employer's Brief at 17. Once again, we note the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco*, 892 F.2d at 1480-81. Moreover, as the ALJ discredited Dr. Zlupko's opinion, it did not affect his finding of total disability. *See Rafferty*, 9 BLR at 1-232; Decision and Order at 22; Director's Exhibits 14, 17. Thus Employer has not explained how the "error to which [it] points could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 16-18. Because the ALJ acted within his discretion in finding Dr. Zlupko's opinion unpersuasive and in finding Dr. Basheda's opinion more persuasive than Dr. Rosenberg's contrary opinion, we affirm his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22.

We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 22. Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[6] or that "no part of

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[7]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Basheda and Rosenberg.[8] They opined Claimant does not have legal pneumoconiosis but has a restrictive impairment unrelated to coal mine dust exposure. Employer's Exhibits 2 at 24; 5 at 6. The ALJ found their opinions equivocal, inadequately reasoned, and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 14-15.

Employer argues the ALJ provided invalid reasons for finding the opinions of Drs. Basheda and Rosenberg not credible. Employer's Brief at 19-22. We disagree.

Drs. Basheda and Rosenberg excluded coal mine dust exposure as a cause or contributing factor to Claimant's restrictive impairment. Employer's Exhibits 2 at 24; 6 at 27, 33; 7 at 30-31, 38. Dr. Basheda stated Claimant has a "[r]estrictive pulmonary disease of uncertain etiology – possible asbestosis." Employer's Exhibit 2 at 24. He further stated Claimant's pulmonary restriction "may be a combination of his weight and his abnormalities found on his chest radiograph." Employer's Exhibit 6 at 26. In addition, he stated Claimant's exercise-induced hypoxia "may be" related to some undefined pulmonary process and his "concern would be for asbestos related lung disease or unstable cardiovascular disease." *Id*. at 34. Similarly, Dr. Rosenberg stated Claimant "has mild ventilatory reduction . . . likely related to obesity and body habitus," and "[i]t does not relate to a pneumoconiosis." Employer's Exhibit 5 at 6. He further stated Claimant's

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

[8] The ALJ also considered Dr. Zlupko's opinion that Claimant has legal pneumoconiosis in the form of a severe functional impairment related to coal mine dust exposure. Director's Exhibits 14, 17. He found Dr. Zlupko's opinion equivocal, not well-reasoned, and thus "does nothing to rebut the presumption." Decision and Order at 14-15.

pulmonary function studies revealed restriction "likely related to his obesity." Employer's Exhibit 7 at 27-28.

As the trier-of-fact, the ALJ has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Here, the ALJ permissibly found Drs. Basheda's and Rosenberg's opinions equivocal based on their speculative terms and thus unpersuasive to affirmatively establish Claimant does not have legal pneumoconiosis.[9] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); Decision and Order at 14-15. Because the ALJ acted within his discretion in rejecting both opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 23-25. He rationally discredited Drs. Basheda's and Rosenberg's opinions on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease.[10] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 24-25. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

[9] Because the ALJ provided a valid reason for discrediting the opinions of Drs. Basheda and Rosenberg on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 19-22.

[10] Neither physician offered an opinion on disability causation independent of his reasoning relating to the absence of pneumoconiosis.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge